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No. 85-278

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TERRELL DON HUTTO, *et al.*,

Petitioners,

vs.

JOHNNY JONES and HUEY DAVIS, III, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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TERRELL DON HUTTO, et al.,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for The Eighth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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Statement of the Case

This case concerns an appellate court's proper application of its review powers to affirm detailed findings of fact by a district court.

In 1974, Respondents Johnny Jones and Huey Davis, III, filed a class action lawsuit against the Arkansas Department of Corrections and certain named individuals within the department. The case was brought pursuant to 42 U.S.C. §§ 1981 and 1983 and 42 U.S.C. §§ 2000e et seq. (Title VII of the Civil Rights Act of 1964) and alleged that the defendants had discriminated against Respondents and the class they sought to represent with respect to hiring, training, promotion, assignment and other terms and conditions of employment. Following two years of discovery, which included three sets of interrogatories and one request for admissions, the Respondents Jones and Davis moved the district court to certify the case as a class action pursuant to Rule 23(b)(2), Fed. R. Civ. P. The district court conditionally certified a class by Order

dated September 27, 1976. The parties engaged in further discovery over the next five and one-half years and the district court was able to further define the class by Order dated January 18, 1982. At the time of the January, 1982 Order, the record produced by the Respondents before the district court consisted of six sets of interrogatories (propounded and answered), three sets of admissions and nine depositions.[1] After modifying the class designation on March 22, 1982, to define the ending date for inclusion in the class as the date of judgment, the court asked the parties to proceed to trial.

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[1] In addition, employment practices had been examined in a series of cases involving racial discrimination in prison conditions. See Appendix B at B-1, B-8 to B-15.

The case was tried before the court for fifteen (15) days between March 29, 1982 and April 28, 1982. Approximately sixty witnesses were called and more than 400 exhibits admitted into evidence. After reviewing almost 4000 pages of transcript and more than 1000 pages of depositions, the district court "issued a cogent opinion which copiously analyzed the abundant evidence presented in this case." Appendix A at A-3. The court found that the Department of Corrections had discriminated against the class of black employees in promotions, assignments and other terms and conditions of employment but held there was no discrimination with respect to hiring.

On appeal, the Department of Corrections challenged the district court's findings of discrimination and suggested that the district court had insufficient

evidence on which to certify the class as defined. The Eighth Circuit affirmed the findings of discrimination, holding that "[t]here [was] substantial evidence in the record to support the court's factual determinations which formed the basis for the finding of liability." Appendix A at A-5. The Court also rejected the Department's contention with respect to class certification, holding that there was no need to hold an evidentiary hearing. Appendix A at A-4.

Reasons for Denying The Writ

The questions presented challenge the Eighth Circuit's proper exercise of its appellate jurisdiction, giving due regard to the findings of fact of the trial court. Anderson v. City of Bessemer City, 105 S.Ct. 1504 (1985); Pullman-Standard v. Swint, 456 U.S.273 (1982). The petition should be denied because it presents no

conflict of decisions among the circuits, because it presents no conflict with the decisions of this Court, and because it presents no important issues that need to be resolved by this Court.

ARGUMENT

I. THE EIGHTH CIRCUIT PROPERLY AFFIRMED THE FINDING OF UNLAWFUL DISCRIMINATION AGAINST THE CLASS.

The entire basis of the Petitioners challenge herein appears to be that although (1) the Respondents presented allegations and testimony concerning intentional acts of discrimination and (2) the district court made "numerous findings" of purposeful discrimination, the district court improperly used the term disparate "impact". Thus the Petitioners do not challenge the district court's findings of fact of intentional discrimi-

nation,[2] but merely claim that the district court failed to characterize it correctly. In effect, the Petitioners wish to secure certiorari so that the district court would be compelled to change the word "impact" to "treatment".[3] As the Eighth Circuit held, "the evidence sufficiently supported both [treatment and impact] theories of liability in this case." Appendix A at A-7. Throughout their Eighth Circuit brief, the Peti-

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[2] The Petitioners had originally challenged the district court's findings as clearly erroneous, but conceded at oral argument that, given the record of discriminatory practices herein, it was a difficult position to maintain under Anderson v. City of Bessemer City, 105 S.Ct. 1504 (1985). They have abandoned the assertion before this Court.

[3] Before the Eighth Circuit, the Petitioners conceded that the district court had made numerous findings of classwide disparate treatment, but sought a remand so that the Department's practices could be evaluated under a disparate treatment analysis.

tioners attempted to demonstrate the district court's error by pointing out that the Respondents produced substantial evidence and testimony of disparate treatment, not impact. The Petitioners acknowledge, for example, that there was substantial testimony concerning the "assignment of blacks to least desirable jobs; mistreatment and verbal abuse by white supervisors; arbitrary terminations of blacks for reasons for which whites are not terminated; submission of only white applicants to QRC and Legislative Counsel; subjective denials of promotions due to favoritism toward white applicants; and a multitude of other intentional acts of discrimination." Appendix A at A-7, citing Appellants' Brief at 10 (emphasis added by Eighth Circuit).

Whether the findings of intentional discrimination are placed in an "excessive subjectivity" impact model or a "disparate treatment" model, the one unalterable fact is that the Department had a pattern of treating members of the class differently because of their race. As this Court held in International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15, "[e]ither theory may of course, be applied to a particular set of facts." The district court and the Eighth Circuit properly applied this principle. See e.g., Appendix A at A-7.

II. THE CLASS WAS PROPERLY CERTIFIED IN THIS CASE

During the course of the litigation the Petitioners have sought to make a major issue out of the fact that the district court did not hold an evidentiary

hearing on the class action issue. The district court did not credit this position and neither did the court of appeals. Appendix A at A-4. In an attempt to create this illusory issue, the Petitioners have completely ignored all the discovery adduced by the parties and available to the district court in deciding on the appropriateness of a class. In General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147, 160 (1982), this Court noted that "[s]ometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim." Here the plaintiffs went substantially beyond the pleadings and supplemented the record with extensive discovery. Through the discovery process, the court learned, inter alia, that (1)

vacancies were filled by promotion from within, (2) the Department provided on-the-job training for employees, (3) the same individuals controlled the hiring, promotion, assignment and discipline practices within the Department and (4) black employees were concentrated in lower level positions. There was ample evidence to satisfy the requirements of Rule 23.

The Petitioners assert that commonality and typicality are lacking because "the other witness[sic] advanced a wide range of complaints covering virtually every aspect of the Department of Correction." Petition at 8. This, however, supports the maintenance of a class action because the complaints had a common element --the subjective decisionmaking process within the Department. As this Court held in General Telephone Co. of the Southwest v. Falcon, supra, 159 n.15, the

commonality and typicality requirements of Rule 23(a) may be satisfied if there is "[s]ignificant proof that an employer operated under a general policy of discrimination" and "the discrimination manifested itself ... in the same general fashion, such as through entirely subjective decisionmaking processes." The district court found, and the Petitioners do not dispute, that "the 'subjectivity' of the wardens and others who controlled the promotion process" was the practice and policy which disadvantaged class members. Petition at 11. This is a particularly appropriate situation in which to use the class action provisions. The common issue concerns the defendants' practice of utilizing this subjective process to favor whites over blacks.

The district court was able to determine that the plaintiffs and the class were similarly disadvantaged by this subjective process in promotions. Moreover, the testimony and other evidence at trial demonstrated that the plaintiffs' claims were typical of other class members.[4]

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[4] For example, the district court found that blacks as a class had to be overqualified and that "[w]hites [were] routinely promoted without the stated qualifications and ... allowed extensive periods of on-the-job training." Appendix B at B-16. Plaintiff Jones was a victim of this and other common practice of the defendants. See Appendix B at B-29.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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